BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

LEISA A. RAJEWSKI	)	
Claimant	)	
VS.	)	
	)	Docket No. 244,851
HALLMARK CARDS, INC.	)	
Respondent	)	
Self-Insured	)	

ORDER

Claimant appeals the November 30, 2004 Award of Administrative Law Judge Bryce D. Benedict. Claimant was awarded benefits for an 18 percent permanent partial general body disability on a functional basis, followed by a 47.2 percent permanent partial general work disability for injuries suffered through November 11, 1998. Oral argument was presented to the Appeals Board (Board) on May 17, 2005.

APPEARANCES

Claimant appeared by her attorney, John J. Bryan of Topeka, Kansas. Respondent appeared by its attorney, Gregory D. Worth of Roeland Park, Kansas.

RECORD AND STIPULATIONS

The Board has considered the record and adopts the stipulations contained in the Award of the Administrative Law Judge (ALJ).

ISSUES

1. Is respondent entitled to a credit for 12 weeks temporary total disability compensation paid from April 5, 2000, to June 28, 2000?

2. Did the ALJ properly determine that claimant reached maximum medical improvement no later than January 16, 2004, and was respondent properly granted a credit for the overpayment of temporary total disability compensation?

3. Is claimant entitled to penalties under K.S.A. 44-512b (Furse 1993)?

4. What is the nature and extent claimant's injury? More particularly, is claimant entitled to a permanent partial general disability under K.S.A. 1998 Supp. 44-510e?

5. Is claimant entitled to future medical care with a designated physician or should claimant's right to future medical treatment be upon proper application to the Director of Workers Compensation?

6. Did the ALJ properly calculate the award?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the entire evidentiary record filed herein, the Board finds as follows:

Claimant worked as a feeder/packer for respondent for approximately three years. This job involved packing envelopes into boxes, including 16 to 18 boxes an hour, with 2,400 envelopes per box. Claimant testified this job involved grabbing, turning, pushing, pressing and squeezing. When claimant began working for respondent, she had no hand or arm difficulties and had never had medical treatment to her shoulders or arms. She had also had no medical treatment to her back or neck.

Approximately a year and a half after beginning work with respondent, claimant began developing problems with her hands. Claimant testified her hands would go numb and she experienced pins and needles up her arm and into her shoulders. Claimant advised her supervisor and was referred to the on-duty nurse. Beginning in November 1998, claimant was placed on light duty.

Claimant was referred for treatment to Craig L. Vosburgh, M.D., and, on March 5, 1999, she underwent a right rotator cuff repair. Claimant was also referred to Cygnet Schroeder, D.O., of Kansas Rehabilitation Hospital, where she underwent an MRI on her neck and right shoulder. She was then referred to John D. Ebeling, M.D., by Dr. Schroeder, who advised that claimant may need surgery on her neck.

Ultimately, claimant was referred to Paul Arnold, M.D., at the University of Kansas Medical Center, who performed surgery on claimant's neck on April 5, 2000. Claimant underwent a C4 through C7 anterior cervical cortical ring allograft/autograft and fusion and a C4 through C7 anterior cervical plate fixation. Claimant continued on light duty until just before the April 5, 2000 surgery. Claimant has not worked since the cervical spine surgery.

Claimant was paid temporary total disability compensation for the period September 21, 2000, to May 5, 2004. Additionally, for the period April 5, 2000, through June 28, 2000, claimant was paid her regular wages, with respondent being reimbursed from its workers compensation administrator for the equivalent amount of temporary total disability compensation which would have been due on a weekly basis during that period.

Since her cervical surgery, claimant has not sought any type of employment and at the time of the regular hearing, was receiving Social Security disability benefits. Claimant testified she is incapable of performing any type of job.

Claimant was referred to Daniel D. Zimmerman, M.D., by her attorney for an examination on January 16, 2004. Dr. Zimmerman found claimant to have cervical spinal stenosis as well as being post-surgery C4 through C7. Further, claimant was post-surgery to her right shoulder, which Dr. Zimmerman described as a release of the AC ligament and an anterior acromioplasty with an open distal excision of the clavicle. Dr. Zimmerman rated claimant at 30 percent to the body as a whole for the cervical spinal stenosis and 16 percent to the body as a whole for her residual shoulder condition, which combine for a 41 percent permanent partial impairment to the whole person based upon the fourth edition of the AMA *Guides*.[1] He restricted claimant to lifting 20 pounds on an occasional basis and 10 pounds frequently. He also recommended she avoid frequent flexion, extension, twisting, torquing, pushing, pulling, hammering and reaching activities with the upper extremities and further recommended she avoid work activities at shoulder height or above on the right side. Dr. Zimmerman was provided a task analysis from Bud Langston, from which Dr. Zimmerman determined claimant was incapable of performing any of the tasks contained therein resulting in a 100 percent loss of task performing abilities. As of the January 16, 2004 examination, Dr. Zimmerman found claimant to be at maximum medical improvement.

Claimant was referred by respondent to James S. Zarr, M.D., a physical medicine and rehabilitation specialist, with the examination occurring on August 17, 2004. Dr. Zarr concurred that claimant was at maximum medical improvement. Dr. Zarr diagnosed claimant with persistent neck pain with radiculopathy into the right upper extremity, status post C4 through C7 diskectomies with fusion and plating, and status post arthroscopic right shoulder rotator cuff repair with distal clavicle excision. For the cervical injury, he assessed claimant a 10 percent impairment to the body as a whole. For the right shoulder, he assessed claimant a 13 percent impairment to the body as a whole which, when combined, would result in a 22 percent permanent partial impairment to the body as a whole, all based upon the fourth edition of the AMA *Guides*.[2] Dr. Zarr reviewed a task list prepared

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[1] American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (4th ed.).

[2] AMA *Guides* (4th ed.).

by Mr. Langston, finding claimant incapable of performing five of the twelve tasks for a 42 percent task loss. He also reviewed the task list created by Dan Zumalt, respondent's vocational expert, finding claimant incapable of performing eleven of the non-duplicative twenty-one tasks, for a 52 percent task loss. Dr. Zarr restricted claimant from lifting greater than 25 pounds and restricted against overhead activities with the right arm. He testified that claimant is capable of performing work activities within his recommended restrictions.

Both Mr. Langston and Mr. Zumalt testified regarding claimant's ability to obtain employment. Mr. Langston advised that claimant was permanently totally disabled from employment. However, it was noted the information provided to Mr. Langston did not include the reports of either Dr. Zimmerman or Dr. Zarr. In fact, Mr. Langston was provided no medical reports, but, instead, was provided a paraphrased report by claimant's attorney in the form of a letter to Mr. Langston. Mr. Zumalt was provided the records and recommended work restrictions of both Dr. Zarr and Dr. Zimmerman. Mr. Zumalt opined claimant was capable of earning from $8 an hour to $11.47 an hour at various occupations, which were contained in his October 29, 2004 letter to claimant.[3]

In workers compensation litigation, it is the claimant's burden to prove her entitlement to benefits by a preponderance of the credible evidence.[4]

Respondent contends it is entitled to 12 weeks credit for temporary total disability compensation paid April 5, 2000, through June 28, 2000, while claimant was paid her full salary. Respondent argues, based upon a document which was admitted as an exhibit at the regular hearing,[5] that reimbursement was made to respondent to cover those temporary total disability compensation weeks. However, respondent's exhibit 1 was admitted over claimant's objection, without foundation. The admissibility of this document was not raised to the Board on appeal. The exhibit, which is titled Claim Advice, indicates a payment to the order of Hallmark Cards, showing the sum and the period involved. However, there is no indication from whom the payment was made. Additionally, there was no testimony to support the reason for the exhibit, how it was created or from where the numbers were generated. Under K.S.A. 44-510f(b) (Furse 1993), if an employer voluntarily pays unearned wages to an employee in excess of the amount of disability benefits to which the employee is entitled, the excess amount shall be allowed as a credit to the employer in any final lump sum settlement. However, when seeking credit for overpayments of temporary total disability compensation, it is the employer's burden to prove its entitlement to that money. The slim evidence provided by respondent does not

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[3] Zumalt Depo., Ex. 3.

[4] K.S.A. 1998 Supp. 44-501 and K.S.A. 1998 Supp. 44-508(g).

[5] R.H. Trans., Resp. Ex. 1

satisfy that burden. The Board, therefore, finds that respondent is not entitled to additional credit for the 12 weeks of payments alleged from May 5, 2000, through June 28, 2000.

Claimant was paid temporary total disability compensation from September 21, 2000, through May 5, 2004. However, as noted above, Dr. Zimmerman examined claimant on January 16, 2004, finding claimant to be at maximum medical improvement at that time. The only other medical opinion in the record is that of Dr. Zarr, who found claimant to be at maximum medical improvement on the date of his examination on August 17, 2004. Claimant argues that Dr. Zarr's opinion is more credible. However, the Board notes no distinction between Dr. Zarr's opinion and that of Dr. Zimmerman. Both physicians found claimant to be at maximum medical improvement. The only distinction is the date on which they examined claimant. The Board finds both doctors are correct, that as of the date of their respective examinations, claimant was at maximum medical improvement. The Board finds the earliest date at which claimant would have reached maximum medical improvement based upon this record is January 16, 2004. Therefore, claimant's entitlement to temporary total disability compensation would end as of that date.

Claimant further argues entitlement to penalties under K.S.A. 44-512b (Furse 1993). That statute allows a penalty in the form of interest as prescribed under K.S.A. 16-204, and amendments thereto, to be assessed against the employer or the insurance company for failure to pay disability amounts due without just cause or excuse. In this instance, claimant argues that the lowest possible rating which could be assessed to claimant was a 10 percent impairment to the neck and a 22 percent impairment to the right upper extremity, which combine for a 22 percent impairment to the body as a whole under Dr. Zarr's rating. However, the nature and extent of claimant's injury were at issue during the pendency of this litigation. Additionally, the ALJ determined that claimant had only a 5 percent impairment to the cervical spine, rather than the 10 percent argued by claimant. The Board finds pursuant to K.S.A. 44-512b (Furse 1993) penalties in this instance would not be appropriate.

With regard to the nature and extent of claimant's injury, the Board considers the opinion of Dr. Zarr to be the most credible opinion in the record. Dr. Zarr assessed claimant a 10 percent impairment to the cervical spine and a 13 percent impairment to the right upper extremity, which combine for a 22 percent whole person impairment.

K.S.A. 1998 Supp. 44-510e defines permanent partial general disability as,

> . . . the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury.

However, that statute must be read in light of *Foulk*[6] and *Copeland.*[7] In *Foulk*, the Kansas Court of Appeals held that a worker could not avoid the presumption against work disability as contained in K.S.A. 1988 Supp. 44-510e (the predecessor to the above quoted statute) by refusing an accommodated job that paid a comparable wage. In this instance, claimant was not offered an accommodated job with respondent and the policies set for in *Foulk* would, therefore, not apply. However, in *Copeland*, the Kansas Court of Appeals held, for the purposes of the wage-loss prong of K.S.A. 44-510e (Furse 1993), that a worker's post-injury wage should be based upon the ability to earn wages, rather than the actual earnings, when the worker failed to make a good faith effort to find appropriate employment after recovering from the work-related accident.

> If a finding is made that a good faith effort has not been made, the factfinder *[sic]* will have to determine an appropriate post-injury wage based on all the evidence before it, including expert testimony concerning the capacity to earn wages. . . .[8]

In this instance, claimant acknowledged that she had made no effort since leaving respondent's employment prior to the April 5, 2000 neck surgery, to find any employment. Both Dr. Zimmerman and Dr. Zarr testified claimant was capable of working. Only Bud Langston, claimant's vocational expert, testified that claimant was incapable of finding any type of employment. The Board finds the opinion of Mr. Langston to be severely damaged by the failure of claimant to provide Mr. Langston with a complete set of medical records upon which Mr. Langston could base an opinion as to claimant's ability to earn wages.

Dan Zumalt, on the other hand, was provided substantial medical records upon which to base an opinion regarding claimant's ability to perform work. Mr. Zumalt found claimant capable of earning between $8 and $11.47 an hour plus benefits. The Board finds Mr. Zumalt's opinion to be somewhat optimistic. The Board believes claimant has the ability to earn $8 an hour, which equates to a $320 average weekly wage on a 40-hour week. When compared to claimant's average weekly wage of $607.28, this results in a 47 percent loss of wages.

K.S.A. 1998 Supp. 44-510e requires a task loss opinion be provided in the opinion of the physician. Both Dr. Zimmerman and Dr. Zarr provided opinions in this matter. The Board finds the opinion of Dr. Zarr to be the most credible. Dr. Zarr saw task lists created both by Mr. Langston and by Mr. Zumalt. In reviewing those task lists, Dr. Zarr found

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[6] *Foulk v. Colonial Terrace*, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), *rev. denied* 257 Kan. 1091 (1995).

[7] *Copeland v. Johnson Group, Inc.*, 24 Kan. App. 2d 306, 944 P.2d 179 (1997).

[8] *Id*. at 320.

a 52 percent task loss based upon the list provided by Mr. Zumalt and a 42 percent task loss based upon the task list provided by Mr. Langston. The Board finds no reason to place greater weight upon either opinion and, therefore, averaging both the opinions from Dr. Zarr, finds claimant to have suffered a 47 percent loss of tasks. This, when compared to claimant's wage loss of 47 percent, results in a 47 percent permanent partial general disability for the injuries suffered through November 11, 1998.

The Board finds claimant is entitled to future medical care upon proper application to and approval by the Director.

Claimant's temporary total disability compensation, which is awarded from September 21, 2000, through January 16, 2004, shall be calculated based upon claimant's modifying average weekly wage. For the period September 21, 2000, through October 2, 2002, claimant's average weekly wage was $462.50, which results in a $308.35 weekly temporary total rate. As of October 2, 2002, claimant's fringe benefits were discontinued, therefore increasing her average weekly wage to $607.28. For the period October 3, 2002, forward, claimant's disability payments will be based upon weekly benefits of $366 (the appropriate weekly maximum rate for an injury of November 11, 1998). As of January 17, 2004, claimant is found to be no longer temporarily totally disabled and benefits for a permanent partial general disability under K.S.A. 1998 Supp. 44-510e will be awarded.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge Bryce D. Benedict dated November 30, 2004, should be, and is hereby, modified and claimant is awarded a 47 percent permanent partial general disability for injuries suffered through November 11, 1998. Respondent is denied credit for the alleged temporary total disability compensation payments of April 5, 2000, through June 28, 2000. Claimant's entitlement to temporary total disability compensation ceased as of January 16, 2004, when claimant reached maximum medical improvement, and claimant's award is based upon a 22 percent whole body impairment on a functional basis, followed by a 47 percent permanent partial general disability.

Claimant is awarded 106 weeks of temporary total disability compensation at the rate of $308.35 per week for the period September 21, 2000, through October 2, 2002, totaling $32,685.10. Claimant is then awarded an additional 67.29 weeks of temporary total disability compensation at the rate of $366 per week for the period October 3, 2002, through January 16, 2004, totaling $24,628.14. In addition, claimant is entitled to permanent partial disability compensation at the rate of $308.35 per week for 91.30 weeks for a 22 percent functional disability. Effective January 17, 2004, claimant is entitled to

permanent partial disability compensation at the rate of $366 per week for a 47 percent permanent partial work disability, for a total award not to exceed $100,000.

As of the date of this award, the entire amount would be due and owing and ordered paid in one lump sum minus any amounts previously paid. Respondent is entitled to credit for any temporary total disability compensation payments made after January 16, 2004.

Claimant is awarded future medical treatment upon proper application to and approval by the Director.

In all other regards, the Award of the Administrative Law Judge is affirmed insofar as it does not contradict the findings and conclusions contained herein.

IT IS SO ORDERED.

Dated this ____ day of June 2005.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: John J. Bryan, Attorney for Claimant
Gregory D. Worth, Attorney for Respondent
Bryce D. Benedict, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director